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IN THE

Supreme Court of the United States

October Term, 1962

No. ~~1595~~ 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

MOTION AND BRIEF FOR *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1105

DANIELS & KENNEDY, INC.,
Petitioner,
against
A/S INGER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICES OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The National Association of Stevedores respectfully moves this Court, pursuant to Rule 42 (1) of the Revised Rules (1954) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained. The consent of the respondent was requested but was not granted.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association composed of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in

New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 shoremen are employed by the Association's members. These members handled about 70% of all of the cargo lifted in this country.

The interest of the Association and each of its members, as individual stevedoring concerns, are vitally affected by the decision below in that a right to a jury determination has been encroached upon and in that there has been a deprivation of property in derogation of due process.

Aside from these basic issues which, undoubtedly, petitioner will adequately present to the Court, the decision below has created a rule of law which to movant and to the entire shipping community is of major significance and serious concern. The rule would, if allowed to stand, force a stevedore in indemnity actions, to suffer the consequences of [i] willful refusal of shipowners to properly defend against spurious or questionable claims and [ii] suppression of evidence which would tend to erase the initial liability of the shipowner both in order that shipowner might recover not only the amount paid to plaintiff in settlement, but counsel fees and expenses from the stevedore. Additionally, the rule created by the decision below would compel a stevedore to assume the burden of showing that the shipowner's settlement with the plaintiff was "unreasonable".

Such a violent shift in traditional concepts concerning burden of proof can result only in economic waste and an increased accident rate for shipowners will no longer be concerned with safety or the prevention of accidents.

We urge, therefore, in order to correct the errors of the decision below that this Court restate and reclarify the principles of indemnity and in particular where a ship-

owner elects to settle with plaintiff prior to maintaining an action for indemnity against a stevedore that such shipowner be obliged to first establish his initial liability.

Movant, accordingly, requests leave to file the accompanying brief so that these issues which are of great importance to the stevedoring and shipping industries can be presented to the Court.

Respectfully submitted.

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Dated: New York, N. Y.
May 29, 1963.

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE*

The interest of the National Association of Stevedores *Amicus Curiae*.

The National Association of Stevedores is a non-profit trade organization of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 longshoremen are employees by the Association's members. These members handle about 70% of all of the cargo lifted in this country.

The interest of the Association in this case is:

1. The individual and direct concern of its members with preservation of the right to a jury trial in indemnity actions.

2. The moral and economic concern with preventing waste, preserving traditional concepts of burden of proof and the concern that the decision below, which grants automatic indemnity to shipowners, fosters rather than prevents shipboard accidents by removing any logical reason for a shipowner to be safety conscious.

ARGUMENT

POINT I

The action of the Court of Appeals, even accepting, *arguendo*, its novel rule of law, represents a redetermination of facts found by a Jury upon the basis of substantial evidence, and thus constitutes a deprivation of Petitioner's Rights under the Seventh Amendment to the United States Constitution.

If we assume, *arguendo*, that the holding of the Second Circuit that "reasonableness"—not liability—is the prerequisite to the recovery of indemnity where the settlement of the indemnitee's liability has been made, nonetheless, the decision of the Appellate Court is violative of the stevedore's Constitutional rights. Furthermore, the action by Judge Bruchhausen in setting aside the special verdict of the jury (D&K Appendix 263a) was in derogation of the stevedore's rights under the Seventh Amendment to the United States Constitution.

A priori, a "reasonable" settlement is one wherein the most probable award that a successful plaintiff would recover (the "exposure") is multiplied by a percentage factor representing the plaintiff's chances of recovery (the "liability discount"). A payment of $50,000 to settle a liquidated damage claim for $10,000 would be, prima facie, "unreasonable." On the other hand, paying $10,000 to

---

[1] The Court of Appeals recognized in its opinion that the elements of a "reasonable" settlement must be twofold. It referred to a settlement (1) in an amount reasonable in view of the size of a possible recovery and (2) the degree of probability of claimant's success against the ship. The identical principle was recognized by the very same Court in *Brown versus U. S. F. & G. Co.*, 2 Cir., 314 F. 2d 675. "According to *Harris* v. *Standard Accident and Insurance Company*, 191 F. Supp. 538, reversed on other grounds, 2 Cir. 297 F. 2d. 627, cert. denied, 369 U. S. 843, the "objective criteria"

(Footnote continued on next page)

settle a $50,000 claim where there was absolutely no liability would be just as "unreasonable".

The jury in the basic case found that the payment by Inger was "plainly erroneous" as to "liability". (D&K Appendix 256a-257a)

"3. If yes, was it plainly erroneous as to amount? No As to liability? Yes."

Any construction of the jury's findings which held that the action of the shipowner in settling was reasonable runs into headlong conflict with the jury's answer to Interrogatory A3 that the payment was "plainly erroneous" as to liability.[2]

---

of a settlement are (1) "the severity of the injuries", (2) "the probability of a plaintiff's verdict", 191 F. Supp. 540. See also Keeton "Liability Insurance and Responsibility for Settlement", 67 HARV. L. REV. 1136, Note 47 at Page 1153, for an evaluation and application of this concept. Inger's counsel in his testimony recognized the principle and carefully maintained it (D&K appendix 54a-55a, 231a, Inger appendix 57a-61a).

[2] Plaintiffs' ad damnum clause demanded $100,000. In the judgment of his counsel therefore that figure represented the maximum amount he could possibly hope to get. The amount of the settlement is thus 30% of the very most that the plaintiff could have gotten.

Counsel for the shipowner on cross examination testified that "the jury might well have brought in a verdict in my opinion, of anywhere between $50,000 and $75,000" (D&K App. 55a), if the plaintiff succeeded in obtaining a verdict. Accordingly, counsel for the shipowner viewed this as an action wherein the plaintiff had between a 40% to 60% prospect of recovering a verdict. The "might well" qualification constitutes a tacit admission that a plaintiff's verdict "might well" be much below that.

It is hard to characterize the Court of Appeal's belief that this settlement amount represented a reasonable settlement, *in toto*, as anything but bland fantasy when it is considered that the jury could see *no possible liability* on the part of the shipowner. Clearly, the jury viewed the sum of $50,000 as a reasonable estimate of the "exposure" if the shipowner were first held liable.

This Court has said, and often, that the function of a court in dealing with a jury determination is to harmonize the court's views with the jury's findings, not vice versa, to conform rather than disrupt, to accept with humility rather than reject with Olympian disdain. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355; *Rogers* v. *Missouri Pacific R Co.*, 352 U. S. 500; *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370; *Schulz* v. *Pennsylvania RR Co.*, 350 U. S. 523; *Ellis* v. *the Union Pacific* [illegible] 329 U. S. 649, 653; *Tennant* v. *the Peoria & P. U.* [illegible] 321 U. S. 29.

A jury verdict which holds:

1. That it was *not possible* that the jury would have found the shipowner guilty of negligence (interrogatory A-4) (D&K App. 257a).

2. That it was *not possible* that the jury would have found the ship unseaworthy (interrogatory A-4) (D&K App. 257a).

3. That the settlement was *plainly erroneous* as to liability (interrogatory A-3) (D&K App. 256a)

is simply not consistent with the finding that the settlement was, in toto, reasonable—no matter what judicial legerdemain is applied.

In finding the stevedore liable herein, the Court of Appeals substituted its judgment for that of the jury on a question considered to be factual. This, we submit, was error.

> "But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.'"

Atlantic & Gulf Stevedores, Inc. against Ellerman Lines, Ltd., 369 U. S. 355, 358, 359.

But the Court of Appeals did even further violence to the jury's findings and to the simple equities of the stevedore's position. According to the jury, the "primary and active" cause of the accident [indeed, the sole cause, when group A of the answers to interrogatories is compared] was "negligence on the part of the agents, servants or employees of the stevedoring contractor" [Interrogatory B-1 and B-2] (D&K Appendix 257a). But the only conclusion permissible from the jury's findings is that the "negligence" of the stevedore's "agents, servants or employees" consisted simply and solely of the plaintiff's misuse of a safe and proper tool. Stevedore simply cannot be said to have been charged by the jury with knowledge of a defective beam jack for the very patent reason that the jury found, as a fact, that the beam jack was not defective.

The shipowner had specifically posited the alleged breach of the stevedore's warranty of workmanlike service upon Peter Damanti and upon no one else. Counsel for Inger explicitly disclaimed, in open court, any intention to hold D&K chargeable with any malfeasance by anyone other than the plaintiff [D&K Appendix 247a]

Thus, the sole fault charged to D&K by the shipowner and the sole fault found to exist on the part of D&K was that of the plaintiff himself.

The Court of Appeals grudgingly recognized this:

> "It is probable that the negligence of the stevedore found by both triers was based solely on the actions of the injured longshoreman" (314 F 2d at 399).

However, the Court refused to give proper legal effect to the issue raised by the jury's express finding.

> "This, however, does not preclude recovery over by the shipowner, but is simply a factor that would reduce the recovery of the injured plaintiff from him.

Pope & Talbot v. Hawn, 346 U. S. 406, 408-409, and thus is to be considered only in determining the reasonableness of the settlement" (314 F 2d at 399).

Having thus determined that the settlement was "reasonable" and that the stevedore had breached its warranty of workmanlike service, the Court of Appeals felt any further analysis unnecessary, and found for the shipowner on the indemnity issue. What is completely lacking, though, from the reasoning of the Court of Appeals is any exploration into the nature of the liability (fanciful or otherwise) which the shipowner allegedly settled in fear of.

Prima facie, a "reasonable" settlement also includes an assessment of the effect that plaintiff's contributory negligence, if any, would have in mitigating any damages he might receive [the "exposure"] under the doctrine of comparative negligence herein applicable. An interesting decision, *Cavalleri v. Isthmian Lines*, D. C. N. Y., 189 F. Supp. 525, 190 F. Supp. 801, holds that any award, in a situation wherein ship's fault and plaintiff's negligence are concurrent, has had, through the operation of the doctrine of comparative negligence, the effect of *completely excising the plaintiff's negligence*. What the jury would have awarded herein, had a verdict been given plaintiff, would have been an amount representing that proportion which the ship's fault bore to the totality of plaintiff's damages. No money award by a jury in plaintiff's favor could have contained any amount representing any fault attributable to the plaintiff.

Therefore, the motivation which allegedly induced the ship to settle was the fear of a money judgment against it, which judgment would relate solely and directly to the ship's own fault—not the plaintiff's negligence.

What then can possibly be the basis for awarding an indemnity in favor of a shipowner when that shipowner has settled wholly and exclusively with regard to that proportion of the causation of the injury which *the shipowner's own fault represents*.

Put another way, logic demands that the indemnity ought be related to the breach of the warranty of workmanlike service. Here that breach is *solely* represented by the negligence of D. K.'s hatch boss, the plaintiff, himself. But Inger paid not one cent to offset Damianti's negligence; it paid $30,000 to avoid the consequence of its own fault.

The Court of Appeals for the Fifth Circuit has squarely held that the negligence of a servant injured because of concurrent negligence on his own and on the part of an outsider cannot be imputed to the master when the outsider seeks to recover indemnity from the master. In a decision construing principles of maritime law: *Brewery v. Dositi Bros. Marine Divers Inc.* decided May 8, 1963 — F2d — the Court said:

> "The doctrine of imputed negligence applies in admiralty . . . Imputed negligence, based as it is on a fiction works to hold the master for injuries to third persons occasioned by the fault of this servant, and to bar the master where his servant contributes or concurs in the harm done the master. We are asked to take the doctrine one step further; to embrace the master through the imputation to the master of the negligence of the servant resulting in injury to himself, to the end of creating liability on the part of the master to an indemnitee under the terms of a contract.
>
> But this additional step does not follow for here no tort against either a third person or the master is present, and the legal fiction of imputed negligence rests on such a tort. Negligence causing injury to one's self will not suffice, for a tort rests on the breach of a legal duty owed another. To take this step would be adding a legal fiction to another legal fiction."

The relation of the Brewery decision to the facts in the case at law is apparent. Equally apparent is the clear conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit. Resolution of this conflict merits consideration by this Court.

Whenever the plaintiff's negligence and the fault charged to his stevedore employer are exactly congruent, as here, it beggars rationality to allow indemnity against the stevedore for an act or omission which has already been excised from the disposition of the main claim, be that disposition by settlement or judgment. Whether the ultimate result be reached by the refusal of the Fifth Circuit to pile one legal fiction on top of another, or by the reasoning of the Court in the *Cavalieri* case, that all plaintiff's fault has been excised,[3] matters little. What matters is that a shipowner should not get a discount from the plaintiff because of his contributing fault and then recover the rest of the settlement from plaintiff's employer because of the very same fault.

The holding of the Second Circuit with respect to Judge Abruzzo's findings

To compound its error the Court of Appeals found that the holding of Judge Abruzzo was "clearly erroneous". The words "clearly erroneous" were used, as if to pay lip service to this Court's holding in *McAllister* v. *United States*, 348 U. S. 19.

The basis for this pronouncement was said, by the Court of Appeals, to be a "review of the entire record". The Court's recitation of those facts of the case which it conceived to indicate Judge Abruzzo's "clear error" consisted simply of an assessment of certain assertions made by the plaintiff.

> "on the liability of the shipowner there was evidence that the beam jack was defective in that it was rusted, pitted, dented, and with its beam holding teeth imperfect, that these defects caused it to slip off the beam and cause plaintiff and the jack to fall

[3] If Cavalieri's reasoning is in error, can D. K. now proceed against Damanti for complete indemnification?

into the hull. Two apparently workable beam jacks were produced at the trial, but a possible inference from the evidence was that the shipowner had concealed and failed to produce the jack involved in the mishap" (314 F. 2d at 398).

Whatever the weight of plaintiff's evidence; it was Judge Abruzzo's function to make a finding with respect to an essential fact—whether or not the shipowner's reaction thereto, the settlement, was in fact "reasonable". Live testimony was received by Judge Abruzzo on this point.

The Court of Appeals, however, felt little restraint in upsetting Judge Abruzzo's decision. His function as a fact finder is somewhat summarily dismissed by the Court of Appeals.

"The court on both trials appears to have ruled as it did in the belief that the determination of no liability on the part of the ship bars recovery over. This, as we have seen, is erroneous, for potential liability is all that is required" (314 F. 2d at 398).

Unfortunately this does less than justice to Judge Abruzzo's decision for he specifically found that Inger's decision to settle was *unreasonable*.

"4. That Inger did not act within the limits of reason in compromising plaintiff's claim" (Inger App. 92a).

Thus, the very fact issue which the Court of Appeals considers dispositive, the "reasonableness" of the settlement, was considered by Judge Abruzzo both on the record of the first trial and on the testimony of live witnesses. His finding with respect thereto is clear and unequivocal.

POINT II

The rule promulgated by the Court of Appeals below, to the effect that an indemnitee need only demonstrate that its settlement of a liability claim was "reasonable", in order to subject an indemnitor to liability over, is morally invidious, economically unsound and wasteful, contrary to accepted decisional law and a deprivation of property in derogation of due process of law.

The pronouncement by the Court of Appeals that the recovery of indemnity from a stevedore may be posited simply on a showing of "reasonableness" of settlement rather than a demonstration of initial liability to the injured man represents a radical departure from the rule as enunciated by virtually every jurisdiction or authority considering the problem. 42 Corpus Juris Secundum Sect. 25 p. 603-604; 42 Corpus Juris Secundum Sect. 35a p. 626 (and decisions cited therein).

Petitioner has treated *in extenso* of the clear conflict between the rationale of the holding of the court below in this respect and the overwhelming weight of precedent. This brief, accordingly, will address itself to a consideration of the consequences of the adoption of any such rule.

Since the complex of interests represented here includes not only injured workers and shipowners but also stevedoring concerns, the fashioning of any rule of law in this area should be considered equally from the viewpoint of the stevedore as from the viewpoint of the claimant and the shipowner.

However, the Court of Appeals of the Second Circuit has sanctioned, nay created, a principle whereby dubious liability claims or claims without legal foundation may be unilaterally settled by shipowners, subject only to a vague and amorphous test of "reasonableness".

Patently, therefore, any shipboard accident can be made the basis of a claim which it is to the shipowner's financial interests to settle on the "reasonable" basis of "exposure". Since an overwhelming mass of longshore accident cases are presently handled through the humanitarian and economically sound mechanics of the Federal Longshoremen's and Harbor Worker's Compensation Act (33 USC Sec. 901 et seq.) the vast expansion of litigated claims against the shipowner implicit in the innovation by the Circuit Court represents a grave and radical threat to the present employer-employee relationships and to the rights of the stevedore-employers.

Obviously, the stevedore's protection against groundless claims urged against shipowners would be completely subverted once his opportunity to challenge the initial liability of the ship is erased, for the impotent stevedore, not the shipowner, would bear the consequences of:

a. A negligent or inept investigation by the shipowner's representatives (compare the instant case wherein the failure of ship personnel to tag adequately the beam jack in question raised a liability doubt in the Court of Appeals).

b. Lackadaisical defense by the shipowner's attorneys where the plaintiff's claim is spurious—but stevedore's fault exists (it seems anomalous to consider that a shipowner's financial interests would be best served by permitting itself to be held liable to a plaintiff).

c. Nonavailability (in a practical sense) of the key witnesses—the plaintiff, his co-employee (nominally stevedore's employees, but actually owing allegiance to each other and the plaintiff) and ship personnel—if the shipowner effects settlement *before* the trial.

d. Suppression of evidence in the hands of the ship which would have strengthened the defense (but

conversely would have weakened the "reasonableness" of its settlement).

e. The temptation to collusion between claimant's attorneys and shipowner's counsel.

f. A violent upheaval in the basic rules as to burden of proof. The stevedore, as third party defendant, would be compelled to shoulder an affirmative burden of demonstrating that the settlement was "unreasonable." If this statement be thought fanciful or exaggerated, consider the very decision of the court below wherein, in the face of a jury finding that it was not possible for the ship to be found liable to the plaintiff, that that the settlement was plainly erroneous as to liability, the Court of Appeals nonetheless found "clearly erroneous" Judge Abruzzo's finding that Inger's settlement was not reasonable).

In view of the above the outlook for the stevedore is bleak. Every shipboard accident represents a potential claim. Every claim represents an ultimate payment by the stevedore of the amount of the settlement, the expenses of litigation, the stevedore's own counsel fees, the counsel fees of the shipowner (it is not overly cynical to suggest that the amount of these fees might be higher were the stevedore paying them than if the shipowner's counsel had to look for reimbursement to his own client), and the expenses of the shipowner.

This, undeniably, is a staggering potential of expense to be faced with in respect to each and every accident occurring on shipboard or in any way connected with a ship.[4] The immunity from suit provisions of the Federal Longshoremen's and Harbor Worker's Compensation Act would cease to have any real meaning whatsoever. Actually, the stev-

[4] Cf. *Gutierrez* v. *Waterman Steamship Company* No. 229 decided May 13, 1963 — US — 31 Law Week 4402.

dore would be in a worse position than if the employee could bring direct suit against the employer, for in addition to the "exposure" of the suit and the costs of defense the stevedore would also be compelled to pay the expenses and the counsel fees of the shipowner.[5]

It is conceded that Maritime Law is largely judge-made. However, the motivations underlying the decision of the Court of Appeals to depart from universally held principles of indemnity remain obscure, but can be inferred somewhat from its allusion to certain language of the Seventh Circuit in the *Chicago, Rock Island* case.

"It (RR) was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employers' Liability Act, it cannot be said that plaintiff made other than a fair and reasonable settlement of its potential liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances." *Chicago, Rock Island and Pacific R. R. Co.* v. *U. S.*, 7 Cir., 220 F. 2d 939, 941.

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[5] Litigation procedures are crude and wasteful, often productive of little financial benefit to other than attorneys. Compare, for example, the testimony of Thomas E. Byrne before the House of Representatives Sub-Committee on the Merchant Marine (June 26, 27, 28, 1961) which was considering the Bonner Bill. Mr. Byrne, commenting on the gross economic inefficiency of liability suits, cited the example of the litigation entitled *Holley* v. *the S.S. Manfred Stansfield*, 186 F. Supp. 212, 186 F. Supp. 805. He pointed out that the widow of the deceased longshoreman therein involved netted, as a result of that protracted litigation, the additional sum of $1,597.45 over what she would have received in benefits under the Compensation Act. The process cost the stevedore-employer some $24,293.71 over what its liability should have been under the Compensation Act.

What a tragic economic waste!

[6] *The Tungus* v. *Skovgaard*, 358 U. S. 588, 611. *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550.

A statement of policy which presumes the inability of a jury to return a verdict fair and equitable to the defendant as well as to the plaintiff seems a poor basis to justify a radical deviation from accepted principles. If it is "sheer folly" to submit to a jury verdict, then something is very, very wrong with our system of jurisprudence.

"Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function." *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62, cited with approval in *Ferguson* v. *McCormick*, 352 U. S. 521, 524.

Whatever the accuracy of the Seventh Circuit's observations concerning the "almost insurmountable difficulties attending defense"[7] in an FELA action they should have little relevancy to the broad class of longshoremen's actions.

In the definitive statement to date on the doctrine of unseaworthiness, this Court took pains to point out that

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550.

There is ample justification for the basic proposition that, in longshoremen cases lacking merit, courts and juries are not reluctant to find for the defendant.[8]

What is conspicuously absent from the thinking of the court below is the notion or rather realization that a sub-

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[7] *Chicago, Rock Island and Pacific R. R. Co.* v. *U. S.*, 220 F 2d. 939, 941.

[8] *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F: 2d 752; *Billeci* v. *United States*, 298 F 2d 703; *Hooper* v. *Terminal Steamship Co.*, 296 F. 2d 281.

jective determination as to "reasonableness" is a poor safeguard for the stevedore's rights. Certainly the courts have looked with extreme disfavor upon all situations wherein one party in a three sided controversy affects to bind a second by his unilateral dealings with the third. If there should be a whisper of conflict of interests, this court has not hesitated to insure that the rights of all are protected.[9]

Can it be said that shipowners' counsel have a moral or ethical obligation to consider the rights of the stevedore in determining whether or not to settle a dubious claim? Should the fact that the stevedore will be subjected to a liability which is predicated on no credible evidence be considered by the shipowner's counsel before settling? Is there a dichotomy of fealty which would divide the loyalty of shipowner's counsel between stevedore and shipowner? The tenets of ethical practice would appear to indicate otherwise.[10]

If shipowner's counsel is ethically foreclosed from consideration of the stevedore's equities, if the protection of his client's interests compels shipowner's counsel to preclude the stevedore from contesting the merits of the basic claim, if the settlement of perjurious or manufactured or sham claims is rewarded by full indemnification plus counsel fees then a premium is put upon injustice and the stevedore sinks further into the slough of judicial indifference.

Under the scheme worked out by the Court of Appeals, the stevedore is incapable of securing his share of the law's protection. Apparently, he must acquiesce meekly in the shipowner's capitulation before an insubstantial claim. Or does he assume the defense of the action—and thereby surrender any chance to contest the shipowner's right to indemnification? Whichever he elects, half of his basic rights have been sectioned away.

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[9] *Czaplicki* v. *The Hough Silvercloud*, 351 U. S. 525.

[10] Cf. Canon 6 of the Canons of Professional Ethics of the American Bar Association.

The Association does not know whether considerations of court congestion persuaded the Court of Appeals to act too strongly in favor of settlement to the derogation of stevedore's rights. If so, it would show a disregard on that Court's part for a party's basic rights which are—or should be—paramount to any consideration of expediency.

Experience demonstrates that this sort of reasoning is not only immoral but fallacious. The flood of doubtful or downright spurious claims implicit in the Court of Appeals newly fashioned rule could only lead to more—not less—congestion of court calendars.

Conclusion

The decision below should be reversed for all the reasons urged by petitioner and for the additional reasons of preventing shipboard accidents by creating a greater concern in shipowners and operators for safety, to prevent economic waste, to preserve traditional concepts of burden of proof and to adhere to the morals of the situation by erasing opportunity for fraud and collusion.

Respectfully submitted,

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